JD–22–06
Huntington, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SMALL STUFF, INC.

and Case 9–CA–41920

TEAMSTERS LOCAL UNION NO. 505,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Donald A. Becher, Esq., for the General Counsel.
Richard W. Gibson Esq. (Beins, Axelrod, Gleason, and Gibson, P.C.), of Washington, DC, for the Charging Party.
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DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL, JR., Administrative Law Judge. This case was heard by me on September 14–16 and October 4–5, 2005, in Huntington, West Virginia, pursuant to an original charge filed on April 18, 2005, by Teamsters Local 505, affiliated with the International Brotherhood of Teamsters (the Union) against Small Stuff, Inc. (the Respondent); the Union filed an amended charge against the Respondent on July 7, 2005.

On July 28, 2005, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). On August 11, 2005, the Respondent timely filed its answer to the complaint essentially denying the commission of any unfair labor practices and asserting certain affirmative defenses.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following findings of fact, conclusions of law, and order.

I. Jurisdiction–The Business of the Respondent

The Respondent maintains and operates a principle office and place of business in Ashland, Kentucky, and has been engaged in the operation of a package delivery or courier services. The Respondent admits that during the past 12 months in conducting its business

operations, it provided services in excess of $50,000 to its customers including another business entity, DHL Worldwide Express, Inc., located outside the Commonwealth of Kentucky. Accordingly, I would find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

It is admitted by the parties, and I would so find and conclude, that at all material times herein, Teamsters Local Union No. 505, affiliated with the International Brotherhood of Teamsters has been a labor organization within the meaning of Section 2(5) of the Act.

III. Background and Other Preliminary Matters Undisputed on the Record[1]

A. The Business of the Respondent

The Respondent, founded in 1993 by Calvin Bradley, the current CEO, operates as a same day courier company, essentially picking up from and delivering packages to customers with whom it has contracts along established routes or on an on-call basis, commonly referred to as "stat" delivery services. Small Stuff's president and chief financial officer is Calvin's son, John P. Bradley. Joseph Coleman is currently the Company's chief operations officer, a position he has held since 2003; he served as president of the Company from 1998–2003.

The Respondent's current main office is located in Ashland, Kentucky, at 5516 Blackburn Avenue, but also has offices in Lexington, Kentucky, and Nitro, West Virginia, located near Charleston. The Nitro office was opened in late 2003; the Lexington office has been open a little over a year. Each office operates essentially in the same way, that is picking up and delivering packages on a same day basis; they have their own managers and sales personnel. However, all drivers are dispatched out of the Ashland office for pickups and deliveries. The Respondent employed prior to April 17, 2005, about 80 employees (including around 60 drivers) and provided delivery service to nearly 500 corporate and residential accounts, including some for whom it provided route delivery services.[2] Prior to April 17, 2005, the Respondent's employees wore uniforms and drove vehicles with the Small Stuff logo affixed.

B. The DHL/Bigfoot Express Relationship

DHL Worldwide Express (DHL) is a German postal/package delivery company with global operations, one of which was located in Huntington, West Virginia.[3] DHL does not employ its own drivers to deliver its packages; rather, it uses independent contractors to perform

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[1] The findings in this section are based on the credible testimony and other evidence adduced at the hearing. In general, these findings are based on undisputed evidence of record or are not otherwise in controversy. As a practical matter, these findings are historical and not dispositive in and of themselves to the issues herein. To the extent any contrary evidence may exist, I have credited these findings over any such contrary evidence.

[2] Prior to April 2005, the Respondent performed route deliveries for a Red Cross affiliate; King's Daughters Medical Center; a company called Home Center; and Quick Pro Delivery. See R. Exh. 11.

[3] DHL moved its Charleston terminal to the Paul Coffey Industrial Park in Ashland, Kentucky, around April 24. This move has no bearing on the resolution of the issues of the instant litigation except that Small Stuff also operates out of the facility.

local pickup and delivery functions. Big Foot Express, Inc. was one such independent contractor performing pickup and delivery for DHL in the Huntington area during certain times material to the instant litigation.

DHL maintained an oversight function at the Huntington facility through an individual, Charles "Tony" Racer, and its regional manager, Tom Gladis. Big Foot Express was owned and operated by Chris Clark. The DHL Big Foot Express delivery operation at Huntington was, for the most part, conducted by 19 drivers delivering and picking up packages along 19 routes established by DHL. All drivers drove DHL yellow color schemed trucks and wore DHL uniforms of the same color; all followed DHL procedures and requirements, including those relating to training, drug screening, and background checks.

The DHL operation in Huntington was housed in a large warehouse-type building with loading bay doors. When a tractor-trailer delivered packages to Huntington from a DHL hub, the packages were off-loaded onto a conveyor belt traveling behind each driver's truck. The drivers pulled the packages marked for their routes, scanned them with (DHL scanners) into the DHL tracking systems and then loaded them onto the delivery vehicles. After loading the trucks, drivers delivered them along the established DHL routes and again scanned the packages at the delivery point. Packages were also be picked up by the drivers and in such case were returned to the Huntington terminal for out-shipment using the same process in reverse. Big Foot drivers followed these DHL mandated procedures.

C. The DHL-Big Foot Drivers Choose the Union

This case succinctly stated is about the Respondent's decision around April 17, 2005, not to hire a group of employees who had, as of around September 23, 2004, selected the Union as their exclusive collective-bargaining representative in an official election conducted by the Board around that time. The employees in question at the time of the Board election were described as follows under and pursuant to Section 9(b) of the Act:

> All full-time and regular part-time drivers and couriers employed by the Employer [Big Foot Express, Inc.] working at or out of its Huntington, West Virginia facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act.[4]

On or about December 7, 2004, the Board certified the election results and the Union as the exclusive collective-bargaining representative of this unit of 19 employees[5] then working for Big Foot Express as drivers, all of whom voted for the Union.[6]

As noted, at the time of election, Big Foot Express was under contract (cartage agreement) with DHL Worldwide Express[7] to make pickup and delivery of packages in the

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[4] See G.C. Exh. 16, a September 23, 2004 copy of the Tally of Ballot indicating that the eligible voters voted for the Union 19 for, none against.

[5] See Exh. 18, Hearing Officer's Report on Objections and Recommendations to the Board in Case 9–RC–17937 dated November 16, 2004, at p. 2.

[6] See G.C. Exh. 7, Decision and Certification of Representative dated December 8, 2004, by a three-member panel of the Board.

[7] Notably, in *DHL Worldwide Express*, 340 NLRB 1034 (2003), the Board determined that DHL was an employer engaged in commerce and subject to coverage under the Act. The contract in question is called officially a cartage agreement. See G.C. Exh. 2(a).

Huntington, West Virginia area along routes established by the DHL; Big Foot operated as an independent contractor for DHL services beginning in about 1998. On about February 14, 2005, DHL notified Big Foot Express that effective April 24, 2005, the cartage agreement between them would be terminated.[8]

Around March 1, 2005, Big Foot Express through its attorney notified the Union by letter that its contract with DHL would be terminated effective April 24, and that it would cease doing business at the Huntington facility and that all Big Foot employees, including bargaining unit employees, would be terminated.[9]

D. The Respondent's Relationship with DHL Prior to April 17, 2005; the Contract Award to the Respondent

The Respondent and DHL have a business relationship going back about 6 years—commencing some time in 1999 or 2000. During these years, the Respondent generally performed, ad hoc, on-demand delivery services for DHL when a regular independent contractor, such as Big Foot, could not handle seasonal delivery or other high volume times; in such circumstances, Small Stuff generally handled the overflow for on-demand customer requests.[10]

In late December 2004, the Respondent was assisting with overflow deliveries for DHL in Huntington. Some time in late December 2004, DHL's Huntington managers, primarily Phil Feneck and Tom Gladis, and the Respondent's vice president for marketing, Joseph Coleman, commenced discussions laying the ground work for Small Stuff's submission of a bid proposal to become a DHL independent pickup and delivery contractor.[11] Pursuant to these discussions, DHL provided to the Respondent a practice bid packet to familiarize the Company with the DHL bid process for independent contractors. DHL also invited the Respondent to tour one of its package sorting operations and meet with local DHL management. In early January, the Respondent's president, J. P. Bradley, and Coleman visited the DHL sorting facility in Nitro, West Virginia, met with Gladis and toured the facility with him with a view toward securing a DHL contract.

On or about January 23, 2005, Gladis invited Coleman to attend an independent contractor's informational meeting. Coleman and Bradley attended this meeting along with its financial officer, James Newkirk, on January 27 and while there, completed an independent contractor information questionnaire.

On February 1, 2005, the Respondent completed and submitted the DHL independent contractor practice bid in which the Company disclosed information, including the number and

[8] See Exh. 19, a letter from DHL to Big Foot Express dated February 14, 2005, notifying Big Foot of the nonrenewal and termination of their agreement.

[9] See Exh. 19, a copy of the March 1 letter to which the DHL termination letter was attached.

[10] Notably, DHL employed the Respondent to make deliveries in 1998 or 1999 when the Big Foot drivers went out on strike. (Tr. 98–99, 685.)

[11] Gladis and Feneck did not testify at the hearing. However, see G.C. Exh. 11, a series of emails between the Respondent and these DHL representatives covering December 29, 2004, through January 3, 2005. Gladis was the DHL manager assigned to warehouse facility in Huntington, out of which Big Foot Express operated. Feneck is DHL's manager for independent contractor development.

type of trucks and drivers, proposed anticipated revenue data, and company background information.[12]

On or about February 14, 2005, the Respondent was advised by DHL of the opportunity to bid on the Huntington delivery area and sent a bid packet. On February 24–25, 2005, the Respondent completed and submitted its formal bid for the DHL pickup and delivery service contract for Huntington.[13]

On March 25, 2005, the Respondent was awarded the bid for the Huntington, West Virginia DHL pickup and delivery operations—the same as the Big Foot operation—and notified officially that the anticipated start-up date was April 17.[14]

E. The Respondent Does Not Hire the Big Foot Drivers

On April 6, 2005, the Respondent's representatives Bradley and Tara Howell[15] met with the Big Foot Express drivers at the DHL Huntington facility. At that time, Bradley and Howell were introduced to the assembled drivers who were informed that Small Stuff had been awarded the DHL contract. The Big Foot drivers were asked if they wanted to keep their jobs by Bradley (or Howell) and all indicated they wanted to retain their jobs.[16] The drivers were told that if interested in employment, they should submit applications to the Respondent's Ashland office; and that no drivers had been hired, only management personnel. Although the Respondent did not then provide the drivers with Small Stuff application forms, the drivers on their own later obtained copies of the Small Stuff applications and a majority of the Big Foot drivers submitted them individually or as a group to Small Stuff between April 6 and 9, 2005. (See G.C. Exh. 5.). None of the Big Foot drivers were contacted regarding their applications

[12] See R. Exh. 9. The Respondent's financial manager, James Newkirk, completed the practice bid; Bradley signed off on the submission. It should be noted that in the practice bid, the Respondent states:

> We have the luxury of manning at minimum levels because of our own facility less than 20 minutes away, which has dispatchers 24–7 and over 60 drivers.

Notably also, Bradley testified at the hearing that at this time he had no understanding as to whether there was a "concrete" opportunity at the DHL Huntington facility out of which Big Foot then operated. (Tr. 609.) However, Bradley indicated that Huntington was a DHL facility the Company desired and, in fact, later in his testimony, conceded that the practice bid was submitted with Huntington in mind. (Tr. 665.) Newkirk did not testify at the hearing.

[13] See R. Exh. 11. This formal bid was very similar to the practice bid proposal. Notably, the area of service was identified and the number of drivers was increased to 19, the exact number of drivers employed by Big Foot.

[14] See. R. Exh. 12, a copy of an email from DHL notifying DHL representatives of a certified letter sent to John Bradley informing him of the award. Bradley, testified that prior to the award, DHL (through one Dave Boozer) informed him that Small Stuff was the frontrunner for this contract and undertook major preparations for the award as early as the beginning of March (Tr. 633), but possibly from the time the Company submitted the bid (Tr. 636). See also G.C. Exh. 11(d), a March 9, 2005 email from Boozer to Bradley regarding the anticipated date of delivery of Small Stuff's vehicles to be utilized in the DHL operation.

[15] Prior to the contract award, Howell was employed as Small Stuff's office manager in the Ashland office. She was later promoted to contract manager exclusively for the DHL contract.

[16] It is undisputed that Big Foot drivers were familiar with the DHL routes, which were not changed at the time of the takeover by Small Stuff, and had passed the required DHL training, drug screening, and other background checks.

and none were hired on or before April 17, 2005, when the Respondent commenced its operations at the DHL Huntington location.

IV. The Unfair Labor Practice Case

The complaint essentially alleges that as of April 17, 2005, the Respondent succeeded Big Foot Express as the DHL's local provider of delivery service in the Ashland/Huntington geographic area and continues as the employing entity and successor to Big Foot Express. Further, it is alleged that the Respondent refused to hire certain named former employees of Big Foot essentially because they selected the Union as their collective-bargaining representative and in order to avoid its obligation to recognize and bargain with the Union, all in violation of Section 8(a)(3) of the Act.[17]

The complaint also alleges that since about April 17, the Respondent has failed and refused to recognize and bargain with the Union, the exclusive bargaining representative of the unit of employees—the former Big Foot employees—and unilaterally established mandatory terms and conditions of employment for these unit employees, all in violation of Section 8(a)(1) and (5) of the Act.

For all intents and purposes, the resolution of the failure to hire allegations will determine the ultimate disposition of the failure to recognize and bargain allegations. Before embarking on a discussion of the evidence presented and the contentions of the party, I will for background first discuss briefly the applicable Board law governing failure to hire cases.

A. Applicable Legal Principles for Refusal-to-Hire Cases

In order to establish a discriminatory refusal to hire violation, the Board has enunciated a three prong test which would require the General Counsel to prove initially that:

> (1) that the respondent [employer] was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000).

If the General Counsel meets this burden, then the Respondent Employer is obliged to show affirmatively that it would not have hired the applicants even in the absence of their union affiliation or for some nondiscriminatory reason.

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[17] In par. 6(a), there are 19 named former Big Foot employees. At the hearing the General Counsel amended the list to include five additional employees. There was no objection interposed by the Respondent. Accordingly, the following individual persons are to be included within the coverage of par. 6(a) of the complaint: Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, George Justice. (Tr. 474.) Stevens and Justice applied on April 29, 2005. See G.C. Exh. 6(a) and (b). Stevens and Justice worked the Pikeville, Kentucky DHL route. Their late applications will be dealt with later herein.

B. Issue Analysis Under FES

Issue: Was the Respondent hiring or had concrete plans to hire around the time it was awarded the DHL delivery services contract and when it commenced operations on April 15–17, 2005?

It is clear and beyond dispute that the Respondent's bid proposal for the DHL contract submitted on February 24, 2005, included 19 full-time drivers and one dispatcher. Therefore, logically, the Respondent anticipated filling 20 full-time employee slots in order to meet the service requirements of the contract from some source(s) either within or without the Company's employee ranks. It is notable that the Respondent's bid proposal does not expressly state that the Company planned to use its existing work force of drivers and dispatchers to staff the DHL contract should it be the successful bidder. In addition to proposing to meet the requirements of the contract, the Respondent also proposed to purchase or lease 19 medium size delivery vans and 2 large vans. Therefore, it is reasonable to assume that the Respondent did not plan to use its existing vehicle fleet to service the contract. Accordingly, it is a logical assumption that there would be a need to have additional drivers for these new vehicles. In my view, the Respondent's proposal is clear evidence of the Company's concrete plan to hire employees for the DHL contract. In my view, for purposes of *FES*, the source of the new hires is immaterial. The Company in some form or fashion needed to fill the driver slots called for by the DHL contract.

I note that while the Company beyond a doubt had prior to its bid submission a complement of around 60 (perhaps 80) drivers and a fleet of vehicles that it could in some theoretical sense staff the DHL contract without having to plan for any additional hires. However, this does not comport with the record evidence. First, based on the credible testimony of the Respondent's Bradley, the DHL contract was to be a significant part of Small Stuff's business; it was a very important account and actually was part and parcel of the Company's plan to expand its operations.[18] Second, consistent with Bradley's business axiom—if you are failing to plan, you are planning to fail—the Company began preparing for the DHL business and commenced serious efforts to staff the 19 routes called for by the DHL contract by canvassing its own employees regarding their interest in the DHL routes as early as February 2005,[19] and initiating specific training in DHL procedures by March 3. So it seems abundantly clear that for purposes of *FES*, the Respondent had concrete plans to hire additional drivers specifically for the DHL contract from sources either within or without its current work force.

It seems clear also that not only did the Respondent have concrete plans to hire for the DHL work, it was indeed hiring for the contract prior to and after the award of the contract. According to the Respondent's records, it hired 16 new employees for the DHL contract between February 17 and June 16, 2005. Moreover, I note at this juncture that of the total number of driver employees (26) assigned to the DHL contract, either current or new hires, only 9 were employed by the Company prior to March 25, the official date of the award of the DHL

[18] See G.C. Exh. 13, the independent contractor information questionnaire in which Bradley stated he was interested in serving Ohio, Kentucky, West Virginia, and Virginia. Bradley also stated at the time of the bid, the Company had for the past 2-1/2 years been trying to "grow" the Company and the DHL contract presented a wonderful opportunity to do this. (Tr. 152).

[19] According to Bradley, around 60 of its drivers were verbally offered the DHL work.

contract.[20] Therefore, for purposes of *FES*, the General Counsel has met his burden to show that the Respondent was hiring and/or had concrete plans to hire to fill the staffing requirements of the DHL contract prior to and after the award of the contract on March 25, 2005.[21]

Issue: Did the applicants (former Big Foot Express drivers) have the experience or training relevant to the announced or generally known requirements of the positions for hire?

The record reflects the following.

The DHL independent contract—the cartage agreement—required, among other things, that all DHL drivers meet certain requirements—background checks, passing drug screens, hazardous materials training, current driver licenses, scanner training. DHL drivers were required to wear DHL uniforms and drove trucks with DHL markings.[22]

The DHL delivery procedure at the Huntington facility was as follows:[23] A sealed DHL tractor trailer loaded with packages arrives from one of the DHL hubs to the DHL terminal such as the one in Huntington; the time of arrival is entered into the computer. The packages are off-loaded from the trailer by a conveyor belt. DHL (Big Foot) contract drivers stand along the

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[20] See G.C. Exh. 8(a) and 8(b), listings of the Respondent's current employees as of July 12, 2005, and new hires from January through June 2005, respectively. These documents were produced per subpoena duces tecum issued to the Company by the General Counsel.

[21] It is of additional significance to me regarding this finding that the General Counsel and the Respondent stipulated and agreed at the hearing that from April 8 through April 13, Small Stuff ran the following ad in the Ashland (Kentucky) Independent newspaper: "Same day courier needs drivers, dispatchers, detail workers, part time and full time, all shifts available, good driving record, drug screening and background checks, apply at Small Stuff Inc., 5516 Blackburn Ave., Ashland Ky EOE." The parties also stipulated and agreed that this ad ceased running on April 14, or at least did not run as of April 15; that this ad was not run in the Ashland Independent on April 4, 5, 6, or 7 or 2005. (Tr. 14–15.) Notably, a former Small Stuff employee, Heather Legg, testified that she answered a newspaper ad placed by the Respondent and was hired on April 20, 2005, and assigned a DHL route serving the Huntington area. Legg was a new employee of the Respondent, that is not hired out of the Respondent's current complement of drivers.

[22] See G.C. Exh. 2(a), the cartage agreement between Small Stuff and DHL, signed on April 7 and April 25, 2005, by these parties. Additionally, Big Foot applicant Richard Perkey testified at the hearing and also provided an affidavit to the Board on March 23, 2005, pursuant to the investigation of this matter. (G.C. Exh. 14.) Perkey was a former Big Foot Express driver (for about 6-1/2 years) who also worked for Big Foot Express' predecessor, a company called Prestige Delivery, which also held an independent contractor relationship with DHL. Perkey testified that he has been delivering packages for about 20 years and he described generally what was required of DHL drivers over the years. I have credited his testimony, which was not rebutted. Notably, former Big Foot Express long-time drivers Colleen Hall and Lavonna Jones also credibly testified regarding DHL requirements that they said they were required to meet, as set out above.

[23] Lavonna Jones, a former Big Foot driver who was employed by that company since 1998 and served as a lead driver, dispatcher, and weekend supervisor, testified to the procedures DHL employed at the Huntington terminal facility and the drivers' role in this process. I have credited her testimony regarding these procedures and the role of Big Foot drivers therein. Jones testified forthrightly and knowledgeably; significantly her testimony was corroborated by Small Stuff's Tara Howell, who was charged with the training of drivers for the DHL contract.

conveyor belt and as each package travels along the belt, the drivers remove each package to be delivered on their routes and scan them into the package tracking system. Each driver loads the packages into his delivery vehicle. The driver then delivers the package and again scans the package to establish the time and fact of delivery to a business or residence. Drivers may also pick up packages, and these are scanned into the system.

Also, DHL drivers are required to follow the DHL route system established for the service area in question.

The Respondent concedes that DHL required specific training for its drivers, including training for scanners, sorting packages, and learning new routes, and that its employees did not have that training but were ultimately given the training. (Tr. 156. See also the Respondent's brief at page 12.)

Based on the foregoing and the record as a whole, I would find and conclude that the Big Foot Express drivers and applicants for the Small Stuff DHL contract jobs as of April 17, 2005, had the required experience, training, and skills to meet the requirements of the positions made available for hire by the Respondent. Moreover, the Big Foot Express drivers as of that date had actually been performing the very work the Respondent had to train its hires to perform under the DHL contract in question. Accordingly, I would find and conclude that the General Counsel has met the second prong of *FES*.[24]

Issue: Did antiunion animus contribute to the decision by the Respondent not to hire the applicants?

The Board has recognized over the years that direct evidence of animus and discriminatory motivation are often elusive and seldom available. *Leading Edge Aviation*, 345 NLRB No. 75 (2005). Accordingly, the Board permits inferences of such to be drawn under all the circumstances of a given case where such direct evidence may be lacking.[25] The Board in accord has found that evidence of suspicious timing,[26] shifting and false reasons given in defense, refusal to interview known unionists either at all or in a timely manner all support and inference of discriminatory motive.[27]

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[24] I would note that the Respondent did not at the hearing or in its brief assert that the Big Foot Express drivers were not qualified to perform under the DHL contract or otherwise. Notably, the Respondent admits that Bradley and Howell visited the Big Foot Express facility on about April 6, 2005, and solicited these drivers' interest in being hired; and suggested that they submit applications for employment with the Company. In any case, there is little or no real dispute as to the qualifications of the Big Foot Express drivers for the route driver positions covered by the DHL and Small Stuff agreement. Moreover, *FES* specifically requires that in the event of ambiguities regarding qualifications of applicants, the burden is on the employer to show that applicants failed to meet the qualifications of the proffered job. See *Americlean*, 335 NLRB 1052, 1053 (2001).

[25] *Jack in the Box Dist. Center*, 339 NLRB 40 (2003); *Hewlett Packard Corp.*, 341 NLRB 492 (2004).

[26] *St. Thomas Gas*, 336 NLRB 711 (2001).

[27] *Americlean*, 335 NLRB 1052, 1064 (2001); *North Bay Plumbing, Inc.*, 327 NLRB 899 (1997).

The General Counsel contends that the pertinent facts and circumstances surrounding the Respondent's failure to hire the 19 Big Foot drivers clearly warrant an inference that it was motivated not to hire them out of hostility to their union involvement and membership.

The General Counsel suggests that the very origin of the DHL/Small Stuff contractual arrangement is in itself suspicious considering that DHL utilized Small Stuff in the context of an earlier work stoppage incident involving Big Foot drivers. Then, in December 2004, on the heels of the Union's successful organizing of the Big Foot drivers and the beginning of contract negotiations, DHL suddenly became interested in Small Stuff, not just for a work stoppage fill-in or holiday overflow deliveries but for a full fledged contractor delivery services. Thus, the General Counsel asserts that Small Stuff's being solicited by DHL for what is essentially the Big Foot Express contract during a time that correlates with the 19 applicants' choice of and representation by the Union suggests that Small Stuff colluded with DHL out of animus to the Union to avoid having to deal with the Big Foot drivers.

The General Counsel further argues that aside from this inauspicious beginning, the record discloses that the Respondent from the beginning purposefully intended not to hire any of the union-represented Big Foot drivers in spite of their clear qualifications to perform the DHL contact. He points to an April 6, 2005 email from Howell to Bradley as illustrative of this point.[28] In this memo, Howell writes of having spoken to a DHL manager, Tony Racer, about the Union showing up on our door, her receipt of inquiries from current DHL drivers about applications, rumors among the drivers that they had been lied to about job prospects, and a potential walkout. More importantly, Howell writes that Racer understood the Respondent's reservation not to use any Big Foot employees although he thought that the Company would be better off using the current drivers.

The General Counsel notes that the Respondent also purposefully delayed (until April 6) formally telling the current Big Foot drivers of the takeover and thus depriving them of an opportunity to apply for the DHL jobs. By the time the contract was to take effect, there were no jobs for them. He asserts this was planned. He notes further that the Respondent's animus was so obdurate, it would not even offer to the Big Foot drivers jobs for routes it was having trouble finding drivers.[29]

The General Counsel contends that the Respondent's representatives testified that the DHL contract was important to the Company, a substantial boost to its business, and it wanted to perform well. The General Counsel submits that given this concern and ambition, it makes little sense for the Respondent to pass up a competent, capable, and experienced work force and instead hire other persons, some of whom had no delivery experience. He contends this is

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[28] See G.C. Exh. 10.

[29] Howell conceded that at the time she was trying to staff the Pikeville, Kentucky DHL routes, she experienced difficulties of one sort or the other in the effort. However, Howell admitted that she did not consider any Big Foot employees for these routes (Tr. 449–452), which are evidently in a geographically difficult area to make deliveries. It is also worth noting that Howell testified that she wanted to have all of her plans in place—including drivers—prior to meeting the Big Foot employees on April 6 because there were rumors that they were going to walk out. In fact, Bradley admitted he was asked by DHL's Tony Racer to keep the Big Foot drivers working to avoid a walkout. (Tr. 472.) This further suggests to me that the Respondent harbored ill will toward the Big Foot employees who were evidently inclined to act concertedly to vindicate their Section 7 rights.

further evidence that the Respondent's failure to hire the Big Foot employees was motivated by union animus.

Moreover, the General Counsel asserts that the Respondent purposely created a false impression that the Big Foot driver could apply for their jobs on the occasion of Bradley and Howell's visit to the Huntington facility around April 6 because, at the time, the Respondent knew that it had completed hiring for the DHL contract and that there were no positions available.

In effect, the General Counsel submits that the Respondent's essential dishonesty, including creating—intentionally so—a discriminatory barrier to their employment because the jobs had already been filled, points to an antiunion connection to the failure to hire these drivers.

Finally, the General Counsel submits the Respondent was not only aware of the Big Foot drivers' union representation but also their inclinations to engage in job actions. He notes that the Respondent had performed "replacement" work when some of the same collection of Big Foot drivers engaged in a walkout some years ago. Moreover, as early as February 2005, a Big Foot driver applicant, Daniel Atkins, informed Coleman that the drivers had voted in Local 55 and "we were a union organizing facility."[30] He contends this knowledge, combined with the Respondent's secretive, surreptitious, and coordinated efforts to take over the DHL work indicate a nefarious and discriminatory motive in not hiring the Big Foot workers.

Regarding the animus issue, the Respondent essentially argues that the General Counsel failed to link any evidence of union animus on the part of DHL's management and Big Foot Express to Small Stuff.[31] In contrast, the Respondent asserts that it made the decision not to hire the Big Foot drivers solely for legitimate business related reasons.

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[30] Atkins testified at the hearing and related his conversation with Joseph Coleman at the Huntington facility. Atkins said that he knew that Coleman was affiliated with Small Stuff, not Big Foot, because he had seen him previously in a television spot dealing with high gas prices and in the caption Small Stuff was mentioned. According to Atkins, Coleman said he was only observing the operation.

Jimmy Christopher Bennett, another Big Foot driver, testified that sometime in January or February 2005, Atkins told someone whom he knew did not work for Big Foot or DHL that the Huntington facility was union. Bennett said the person was among three other non-DHL/Big Foot employees visiting the facility to observe the operation.

[31] It should be noted that no one from DHL or Big Foot testified at the trial. However, certain statements purportedly made by DHL management and the owner of Big Foot Express made their way into the record.

For example, Lavonna Jones, a Big Foot driver, testified that Tom Gladis of DHL in Nitro told her that the Union would do nothing for the Big Foot drivers and, if they were to select the Union, Big Foot's owner, Chris Clarke, would lose the DHL contract and the drivers would lose their jobs. She said that this conversation took place during the election. In January 2005, Jones said that Gladis again asked about the Union and said DHL's predecessor, Airborne express, never allowed contractors to have union representation and neither would DHL. According to Jones, Gladis told her that Clarke's contract would be pulled and drivers would lose their jobs. (Tr. 224–232.)

Richard Perkey, another former Big Foot driver, testified that he met with Gladis and discussed work-related problems the drivers had with a predecessor contractor, Prestige Delivery, and Gladis exhorted him to discourage the drivers from voting a union in; the drivers could lose their jobs and DHL would replace the contractor. Perkey also recalled having a

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I would find and conclude that the General Counsel has met his burden to establish that union animus contributed to the decision not to hire the Big Foot applicants.

Because we cannot read the minds of men, as the Board notes, motivation is a hard read. The best the fact-finder can do in most litigious environments is to assemble fairly the facts and circumstances and, utilizing commonsense and reasonable inference, make a determination as to whether, for purposes of the extant law, an employer has resorted to proscribed conduct or mental state in deciding not to hire individuals—that is, their union representation or involvement.

On this record, I am in general agreement with the reasoning and analysis of the General Counsel regarding the animus issue. I also note that certain facts and circumstances loom large in my determination that the Respondent's animus against the Union contributed to its decision not to hire the Big Foot applicants.

First, it is clear that the DHL contract was a significant business coup for Small Stuff which was ambitious for growth and expansion of its business. DHL presented this opportunity and the Company desired very much to obtain this business and, moreover, to do well in the execution of the contract. The question in my mind, given these admitted goals, is why the Respondent would not take advantage of a ready made driver cadre composed of experienced personnel who knew the DHL procedures, were trained on the DHL scanners, and knew the delivery routes. Instead, the Respondent undertook an approach that required it to scramble to find drivers of unproven reliability and competence and commence training in an accelerated fashion, only to suffer delivery-related problems early on in the contract with one of its driver, a matter complained of by DHL.

The record suggests an answer. First, the Respondent knew that the Big Foot drivers had staged a strike or walkout years before; the Respondent had done replacement work because of the walkout. Second, the Respondent knew as early as January but certainly by

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conversation with Gladis in 2001 when Big Foot had the DHL contract. According to Perkey, Gladis in this conversation also asked whether the employees were still talking about the Union and reminded Perkey of their earlier conversation and what would happen if the employees went union. (Tr. 270–277.)

Colleen Hall, a former Big Foot driver also testified that Chris Clarke called her around February 28, 2005, to inform her that he had lost the DHL contract and volunteered his opinion that DHL was trying to set an example in Huntington because (the employees of) other delivery contractor companies were signing union authorization cards. Hall also related another conversation with Clarke in which he said if the drivers go union, it would be a big mistake because he would either lose the contract (with DHL) or he would pull out of the contract. (Tr. 317–319.)

These statements all are clearly within the realm of hearsay and none of the parties to this action called either Gladis or Clarke, who I presume were both available. Accordingly, I have not considered them for the truth of the matters asserted. However, under Rule 404 of the Federal Rules of Evidence, evidence of the acts—here opinions and statements—of others may be admissible for other purposes such as proof of motive or plan. See Rule 404 3(b). I have not relied wholly, however, on these purported statements of Gladis and Clarke in my determination and resolution of the union animus issue. In my view, nonetheless, they are a permissible part of the *res gestae* of this case and shed some light on the totality of possible circumstances associated with the Respondent's failure to hire the Big Foot drivers.

February 2005 that the Union involved with the earlier job action was the same Union that now represented the Big Foot drivers.[32] The Respondent thus knew that the Big Foot drivers were inclined to walk out and off the job if they deemed job conditions to be unsatisfactory. In fact, on April 6, when Bradley and Howell visited the Huntington facility either on their own (or perhaps as instructed), they were there in my mind falsely to mollify the workers with solicitations to apply for their job with Small Stuff when, in fact, the jobs the drivers would apply for no longer existed. Howell admitted that she wanted everything in place for Small Stuff's performance of the DHL contract because the Respondent (and DHL) feared the Big Foot drivers would walk off the jobs before April 17, the effective date of the contract. Accordingly, the Respondent created a false impression that the Big Foot drivers had a fair chance to be hired for their own jobs irrespective of the takeover by Small Stuff.

These factors, along with the evidence of record cited by the General Counsel, suggest that union animus and/or the Respondent's fear that the Big Foot drivers would engage in protected activity contributed to the Respondent's decision not to hire the Big Foot drivers on or before April 17, 2005.

C. The Respondent's Defense; the General Counsel's Response

Having found that the General Counsel has met his burden under *FES*, we turn to the Respondent's defense of its decision not to hire the Big Foot drivers.

The Respondent contends that its decision to staff the DHL contract positions was based on legitimate grounds, namely, its practice and policy to hire individuals already employed by the Company, family members, former employees, and referrals; its policy of not hiring applicants who submit incomplete applications; and its policy to consider the desired wages of the applicant in the hiring process.

Emphasizing that it is family-owned and operated, the Respondent argues that the evidence of record establishes that the Company has historically staffed new contracts with its existing work force, or in the case of vacancies with proven former employees and others referred to it by trusted relatives and friends. The Respondent notes that not only would it not have hired the big Foot drivers because of this practice, they would not have been hired because there actually were no applications from them for the DHL driver jobs. In fact, the Respondent avers that it was so intent on preparing for the new contract under its prior practice regime, it did not even consider hiring the Big Foot employees. The Respondent implies that the Big Foot applicant's union involvement did not factor at all in the hiring for the DHL contract.

Regarding the Big Foot applications, the Respondent contends it established hiring procedures called for a rejection of incomplete applications which were not even considered further by hiring personnel. Accordingly, where the Big Foot applicants submitted incomplete applications, the Company was at liberty to reject them. To the extent any employees were hired in spite of incomplete applications, the Respondent contends these were mistaken variations from the standard practice.[33]

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[32] In this regard, I have credited the testimony of Daniel Adkins and Jimmy Bennett, both of whom testified to this point.

[33] The Respondent called Aaron Barnett, the manager of Small Stuff's Ashland headquarters, who testified that his responsibilities included hiring of drivers for the Company. Barnett provided the Company's policy regarding application completeness and how the Company dealt with incomplete applications. Barnett testified that the majority of the Big Foot

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With respect to the criterion of desired wages, the Respondent asserts that it rightfully could and did reject Big Foot applicants who sought wages higher than those which the Company would typically pay. In such a case, even where an applicant's application was complete, he or she would not have been hired irrespective of union support or affiliation.[34]

The General Counsel contends essentially that the Respondent's proffered defenses do not hold water, that they are not sufficient to overcome the strength of his prima facie case. He asserts that the Respondent's defenses are a mere shotgun effort to justify its failure to hire the Big Foot applicants. He argues that the Respondent's seniority cum hierarchy system claimed by the Respondent as the guiding or overriding criterion employed in its policy of hiring existing employees for other contract work merely proved to be one of several factors claimed to be in play for the filling of the DHL contract positions.

The General Counsel notes that the Respondent's own witnesses (who should know) testified that the Company also considers whether the driver is a hard worker, whether the workers want the new route or job, the personnel needs or desires of the driver, and his ability to do the job—for example, because of age or other physical condition—and the availability of current employees.[35]

The General Counsel further notes that the Respondent's seniority system is not in any way documented in the Company's records, that this defense reflects at best a self-serving rationale to justify the impermissible and one rife with exceptions as applied.

Regarding the Respondent's claim that the Big Foot applications were defective for completeness, the General Counsel contends that the Respondent hired an employee, Linda Harvey, on April 15, 2005, the same day of her application. However, she did not submit a motor vehicle record until about May 17. The file of another employee—Howard Zeller, hired on April 1 for the DHL work—the General Counsel avers, does not contain a motor vehicle record.[36] Moreover, he notes that in spite of claimed deficiency of the Big Foot applicants' applications, several of them were complete by the Respondent's enunciated standards. He suggests that the Respondent's defense is simply not believable.

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applications were incomplete. (Tr. 738.) Barnett conceded that some of the Big Foot applicants had complete applications, namely Mark Rose, Donald Kees Jr., and Chad Stevens.

[34] Barnett testified that salary considerations were very important in the hiring process because new hires are the lowest on seniority list and are paid by the runs they make; they cannot be guaranteed even as little as $100 per week, let alone $500 to $600 per week as requested by some of the Big Foot applicants.

[35] Notably, Bradley testified that while the Company's normal practice is to offer jobs to its employees first, if none are available then the Company hires from outside. (Tr. 610.) He also testified to other factors considered by the Company which include those cited above but also whether a driver is closer to a pickup, the ability of the driver to deliver timely. Also, Tara Howell, at least with respect to the Pikeville DHL routes, applied to job services organizations to fill these jobs. Bradley also stated that he personally tried to hire drivers for the DHL contract outside of his current work force. (Tr. 654.)

[36] Zeller was Bradley's father-in-law living in Florida at the time and needed a job.

D. Discussion and Analysis

In my view, any one of the Respondent's purported policies separately or even considered as an amalgam, if consistently and honestly employed, would inure Small Stuff against a finding of a violation of the Act. To be sure, an employer is entitled to hire whomever it chooses under its extant policy. Notably, the Board wisely admonishes judges as the finder of fact in unfair labor practice proceedings not to substitute their business judgment for that of the employer. *Lamar Advertising of Hartsford*, 343 NLRB No. 40 (2004).

The Board, moreover, has emphasized that the crucial factor is not whether the business reason was good or bad but whether it was honestly invoked and, in fact, was the cause of the action—here, not hiring the Big Foot drivers. *Framan Mechanical, Inc.*, 313 NLRB No. 53 (2004). Consistent with these precepts where the General counsel has established his so-called prima facie case of unlawful action under Section 8(a)(3), the employer is obliged to show that it would have take the questioned action irrespective of or even in the absence of the protected activity. *Merillat Industries*, 307 NLRB 1301 (1992). Notably, the employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of protected activity. *W. F. Bolin Co.*, 311 NLRB 1118 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

The Respondent is, in my view, entitled to employ policies of its choosing in the selection of its work force. Board law makes this an unassailable right. The Respondent asserts that its policies include as an overarching component, hiring for or staffing its delivery contracts from within the existing work force. Because the Respondent is at its core a small family-owned and run business, it also employs family members, friends of family members, and through word-of-mouth referrals—perhaps from these same persons. The Respondent takes the view that in this fashion, it can assure itself of good and reliable workers.

Of course, the Respondent admits that it seeks employees "off the street," as it were, often to fill positions at the lower end of its work force which tends to have a substantial turnover rate. Accordingly, the Respondent places ads for drivers/workers on a monthly basis in a local newspaper.

The Respondent also maintains a seniority system of sorts; that is, the drivers with lower driver identification numbers are considered "senior" to those with higher numbers, and these senior drivers evidently are given first choice for regular routes which are more remunerative than the on-demand deliveries.

The Respondent also clearly maintains a policy that requires all applicants to submit a complete and documented application form with certified motor vehicle report being a prime requirement. The application form makes abundantly clear with large print and underscoring of required information that certain information is a must.[37] The Respondent's stated policy at the hearing was to reject applications deemed incomplete.

Given that the Employer's employment/hiring policies appear to be legitimate on their face, the question is were they honestly employed with respect to the Big Foot drivers? Stated another way, what would an honest and forthright employer have done under the facts and circumstances of this case given the hiring policies ,when faced with a cadre of employees it

[37] See, for example, G.C. Exh. 5(a), an application from an applicant dated April 6, 2005.

knows are represented by a union and are performing the work that the employer knows it will soon undertake:

> Well, it occurs to me that such an employer would as soon as possible meet with those employees and tell them first that it will be assuming the contract of Big Foot Express, having received the award on about March 25. The employer would in something approaching timely fashion explain to these workers its employment policies, including its desire to hire and promote from within, its seniority policy, and its relevance as to family and friendship connections and the requirement that applications must be complete in particular and significant aspects. The honest and forthright employer would, I would think, provide applications at that time and explain that these must be submitted fully completed within a certain time frame and that the jobs applied for would be either for the DHL contract or other openings within the Company. This Employer, I would think, would also inform the potential applicants that the jobs available were not for their present ones. Rather, the applications would be for other jobs in the Company's organization.
>
> The employer would also explain its wage structure and that it could not guarantee that the applicants' pay requirements would or could be met, that wages would be negotiable; and if the applicant's desired wages were out of line with company policy, he would not be hired.
>
> The honest and forthright employer in my view also would contact these workers it knows have exercised their statutorily protected rights and sought and obtained union representation, to inform them their applications were incomplete and/or their pay demands were excessive. The honest and forthright employer in such circumstances would not merely hire a few of these drivers when informed (through a government investigator) that some of the applicants had indeed timely submitted complete applications.
>
> Juxtaposed to the standards of my hypothetical honest and forthright employer, the Respondent clearly comes up short. Notably, the Respondent's actions were the polar opposite of open and forthright. Notably, Small Stuff from the inception tried to keep its role in the takeover of the Big Foot contract as far below the radar as was possible. At the hearing, the Respondent's Bradley even attempted to convince me that his Company did not know what DHL specific route/contract was available. When pressed on cross-examination, he reluctantly admitted that it was the Big Foot DHL routes he was bidding on. So secrecy was the watch word, and ultimately deception was the modus operandi.
>
> In this latter regard, I was particularly struck by the Respondent's overt dishonesty with the Big Foot employees on April 6. On that occasion, Bradley and Howell, in my view, went to the Huntington facility with the intention of telling those workers, giving them ultimately the false hope, that they could apply for and have an honest chance of keeping their DHL route jobs. The Respondent (Bradley and Howell) admitted on the record that all of the DHL positions had been filled by April 6 and actually by April 1. They admitted that the Company's fear was a walkout before the April 17 effective date of the Small Stuff takeover.[38] So the Respondent made a special trip to Huntington to advise the Big Foot drivers of job opportunities with it. This, however, was a mere ruse, in my view, to keep them working the DHL contract until Small Stuff could begin its official takeover. The proof of the ruse in my view lies in that first, the

[38] While I do not find as such, it is reasonable to infer that the Respondent was acting on the instructions of DHL on April 6. Notably, if the Big Foot Workers walked out prior to April 17, that should have been of no concern to Small Stuff, that was DHL's problem, having terminated the Big Foot contract.

Respondent did not even extend these drivers the courtesy of providing them an application—Howell and Bradley brought none to the April 6 meeting, and in fact, never even attempted to provide applications. Moreover, no Big Foot driver was told that his or her application was defective. Yet, other non-Big Foot applicants submitted apparently incomplete applications and were hired. It seems clear to me that the Respondent from day one had determined that it would not hire these union-represented drivers. I believe that the Company's proffered defense is not honest and sincere.[39] On balance, I am not persuaded by the Respondent's defense. In my view, the Company has merely cobbled together as the General Counsel describes it—"shotgun fashion"—a number of otherwise rational and plausible employment policies and practices[40] in an attempt to justify what I consider the unlawful action it took against the Big Foot drivers. I would find and conclude that the Respondent under the facts and circumstances herein unlawfully discriminated against the Big Foot drivers within the meaning of Section 8(a)(1) and (3) of the Act because these employees joined the Union or to avoid the Union. *Sierra Realty*, 317 NLRB 832 (2001).

E. The 8(a)(5) Allegations

The complaint alleges that the Respondent succeeded Big Foot Express as the provider of local package delivery services for DHL, and that the employees of Big Foot in the unit (described before herein) deemed appropriate by the Board were refused employment by the Respondent because they selected the Union as their collective-bargaining representative; that from December 7, 2004, through April 16, 2005, the Union has been by virtue of the Board's certification the exclusive collective-bargaining representative of the Respondent's employees in the unit in question; and since around April 17, 2005, the Respondent has failed and refused to recognize and bargain with the Union and unilaterally established mandatory terms and conditions of employment for employees in the unit.[41]

The Respondent essentially denies that it is a successor to Big Foot and consequently had no duty to bargain with the Union. Alternatively, it asserts that even it had employed the unit's (Big Foot's) employees, it would not have an obligation to bargain with the Union regarding terms and conditions of their employment because these employees would not have constituted a majority of the Respondent's employees.

As noted by the General Counsel, the threshold test for determining successorship is whether the new employer conducts essentially the same business as the predecessor employer, whether a majority of the new employer's work force in an appropriate unit are former

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[39] Bradley admitted he did not tell the truth to the Big Foot drivers on April 6 and was willing to tell untruths to Newton of the Union. (Tr. 683.)

[40] I should note that while I believe that the Respondent's hiring policies and practices are on their face legitimate and, of course, rational and plausible, the Respondent by its own admission did not employ these consistently, and most notably these policies were not committed to writing. It seems that often these policies to the extent they were implemented at all were done so ad hoc, which in my view would not be out of keeping with a family-owned and operated business. However, where important and known federal statutory rights are involved, employers must apply, in my view, their hiring practices consistent with the law—not family practices or mere convenience.

[41] The complaint actually avers that because Bradley informed the Union that it did not intend to hire any Big Foot employees on April 15, a demand by the Union for recognition is rendered a futile act. The Respondent asserts in its answer that the Union did not demand to bargain with the Respondent.

employees of the predecessor employer. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security services*, 406 U.S. 272 (1972); *E. S. Sutton Realty Co.*, 336 NLRB No. 33 (2001); Adair Express, LLC, 335 NLRB 1224 (2001).

In *Fall River Dyeing*, the Supreme Court stated as follows:

> This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S. at 184. Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S. at 280, fn. 4.

It is clear that under Board and court authorities a successor employer has the right to operate its business as it sees fit and right. *Adair Express, LLC*, at 1227, and within this prerogative the successor has the freedom to hire its own work force. *Howard Johnson Co. v. Detroit Local Executive Board*. The successor employer, however, may not discriminate against union employees in its hiring. *Fall River Dyeing and Finishing Corp.*, id. at 40.

Where an employer discriminatorily refuses to hire incumbents, it is presumed that substantially all of them would have been retained absent the unlawful discrimination. *E. S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001); *Smith and Johnson Construction Co.*, 324 NLRB 970 (1997).

Here, certain evidence is clear to the point of being beyond disputation. As noted by the General Counsel and admitted for all intents and purposes by Bradley at the hearing, the Respondent's DHL drivers perform the same work in the same manner for the same customers along the essentially same DHL routes as did the Big Foot drivers.[42] The Respondent does not work out of the same facility as did the Big Foot drivers because DHL moved to its present facility in the Ashland area. This is a distinction with no legal difference for purposes of the successorship issue here as the Respondent began its DHL operations at the same location as the Big Foot drivers and moved in the interim period.

It is also beyond dispute that the Respondent's successful bid to DHL proposed 19 full-time drivers and 1 dispatcher. Ultimately, around 23 employees including Howell and another manager, Barry Forbes, and 2 Pikeville drivers along with the 19 drivers' slots filled out the Respondent's DHL work complement.

There are 18 former Big Foot drivers who applied for work with the Respondent prior to the time it began operations under the DHL contract and 2 who applied after April 6.[43]

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[42] Bradley would not concede that the Respondent was a successor to Big Foot Express but admitted the only real difference between them was the contractor status. Everything else was essentially the same. See Tr. 106.

[43] The General Counsel notes that the two Big Foot Pikeville drivers, Chad Stevens and George Justice, did not apply until April 29, 2005. (See G.C. Exh. 6(a) and (b).) The General

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Accordingly, I would find and conclude that the Respondent is a successor employer to Big Foot Express.

As to the appropriateness of the unit for bargaining, I would presume, having found that the Respondent discriminatorily refused to hire the Big Foot drivers and took over the very same 19 routes the 19 or so Big Foot drivers covered, and applied for, the Union's majority status would have continued (*State Distributing Co.*, 292 NLRB 1048 (1987)) but for the discriminatory action.

The Board, by virtue of its prior certification on December 7, 2005, determined that an appropriate unit was as follows:

> All full-time and regular part-time drivers and couriers employed by the Employer [Big Foot Express, Inc.] working at or out of its Huntington, West Virginia facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act.[44]

In agreement with the General Counsel, considering my prior findings of discrimination, the presumption that the Big Foot drivers would have been retained by the Respondent absent its discriminatory treatment of them and the Board's certification that these employees constituted an appropriate unit dedicated to the DHL operations, I would find and conclude that the following is an appropriate unit within the meaning of section 9(b) of the Act:[45]

> All full-time and regular part-time drivers and couriers employed by the Respondent [Small Stuff, Inc.] working at or out of its Paul Coffey Industrial Park facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act.

As to the demand for recognition issue, I would agree with the General Counsel that the Union under the circumstances in effect made a valid demand for recognition and/or in the alternative that the Respondent's unlawful refusal to hire the Big Foot applicants rendered any request by the Union to bargain over terms and conditions of employment of these workers an exercise in futility.

The Union's secretary-treasurer and business agent, John Newton, testified at the hearing and related his conversations with Bradley. According to Newton, he called Bradley around April 1, 2005, about the time he discovered that Small Stuff was taking over the DHL

Counsel contends that the two drivers probably applied after the others because they were not at the April 6 meeting at the Huntington facility but should be included among the discrimination. I would concur.

[44] See G.C. Exh. 16, a September 23, 2004 copy of the Tally of Ballots indicating that of the eligible voters, 19 voted for the Union; none were against it.

[45] I note that the employees of independent contractors like Big Foot Express and Small Stuff are required by DHL to wear DHL uniforms, drive DHL vehicles, are paid differently, are supervised by separate supervisors, and must be trained in and adhere to DHL procedures. To be sure, the Respondent's DHL employees constitute a separate, identifiable grouping of employees sharing a community of interest much different from the Respondent's other employees.

contract, and informed him that he represented the Big Foot employees.[46] Newton stated that he also asked Bradley if Small Stuff was indeed talking over this business. Newton said that Bradley never gave him a definite or direct answer one way or the other.

Newton said that he also spoke with Bradley about a week later and again asked him if Small Stuff was taking over the DHL contract and whether Small Stuff was going to hire any of the Big Foot employees; would he consider hiring any. Newton stated in this conversation he touted the Big Foot drivers' qualifications and special abilities; for example, their having timed traffic signals along their routes for better efficiency in making deliveries, and their acquired knowledge of the streets, roads, alleys, and back roads. According to Newton, he on this occasion also could not get a direct response from Bradley and, sensing that Bradley was on unfamiliar ground in terms of labor relations, recommended a good labor attorney to him.

Newton said that about a week later (on a Friday), he took it upon himself and went to Small Stuff's Blackburn Avenue (Ashland, Kentucky) facility, introduced himself as the Teamsters' representative, and asked to speak to Bradley. Newton stated he was introduced to Bradley, who was in the company of two other unidentified persons, and asked him once more whether his Company was going to take over the DHL contract. According to Newton, Bradley told that Small Stuff was taking over the contract and, in fact, would begin operations that coming Monday.

Newton said that he again asked if Bradley intended to hire any Big Foot drivers. According to Newton, Bradley said, initially, that he did not want to answer that question but after a time confessed that he was not going to hire any of these drivers. Newton said that in the meeting he also touted the Big Foot drivers as good workers who would do a good job and informed Bradley that the Union was currently in contract negotiations with Big Foot.

Newton said that he told Bradley that if Small Stuff was not going to hire any of the Big Foot workers, an unfair labor practice charge would be filed by the Union with the Board. Newton said he tried to strike a conciliatory chord with Bradley in telling him that if Small Stuff merely gave him an "inkling" that the Company was going to hire some of the Big Foot drivers, the filing of a charge could be avoided. Newton stated that he pointedly asked Bradley why could he not hire the Big Foot drivers.[47] According to Newton, Bradley held his hands up and said it was not up to him, it was up to a higher power or source. Newton said he never received any word from the Respondent regarding the hiring of any of the Big Foot drivers and the unfair labor practice charges ensued.

I have credited Newton's version of his encounter. He testified in my view forthrightly and sincerely. In fact, he was not cross-examined by the Respondent's counsel, leaving his testimony essentially unrefuted. I am persuaded by dint of the total record herein, as buttressed by Newton's testimony, that a formal demand for recognition by the Union would have been met with stonewalling or other avoidance on the part of the Respondent. In effect, indeed Newton was making a demand for recognition of his Union but was rebuffed on more than one occasion.

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[46] Newton identified a letter (G.C. Exh. 19) sent to him by Big Foot's attorney, Elizabeth Harter, on about March 1, 2005, in which, inter alia, the Union was informed that effective April 24, DHL had terminated the existing agreement. At the time, Newton had formed a negotiating committee composed of Big Foot drivers Colleen Hall, Danny Adkins, and David Oder, all alleged discriminatees herein.

[47] Newton's demeanor on the stand evinced a certain frustration as he testified to this aspect of his conversation with Bradley.

In any case, it seems clear that even if Newton's actions could be considered something less than a formal demand, any such recognition demand in any form, in my view, would have been denied because the Respondent had made up its mind not to bargain with the Union, whom it believed had no legal standing with respect to its work force.

The complaint, as noted, alleges that the Respondent, having refused and failed to bargain with the Union, presumably, has established unilaterally mandatory terms and conditions of the employees in the unit as proposed and set out herein. Based on my findings and conclusions herein, I would find and conclude that the Respondent has in all likelihood established unilaterally mandatory terms and conditions of employment for the unit heretofore determined as appropriate under the Act, in violation of Section 8(a)(5) of the Act. I shall recommend an affirmative bargaining order to remedy this violation of the Act.

On this latter point, an affirmative bargaining order in this case, in my view, vindicates the Section 7 rights of the Big Foot employees who were denied the benefits of, first, the effective exercise of their right to associate and choose a representative and, second, the benefits of collective bargaining that could inure to them by such choice, all of which were the result of the Respondent's discrimination and subsequent failure and refusal to bargain with the Union.

The Board has noted that affirmative bargaining orders which call for bargaining, at least for a reasonable period of time, serves "to protect the newly established bargaining relationship and the previously expressed majority choice, taking into account that the stresses of the organizational transition may have shaken some of the support the union previously enjoyed," *E. S. Sutton Realty Co.* at 409, citing *St. Elizabeth Manor*, 329 NLRB 341, 365 (1999). In short, the Union here won the hearts and minds of the Big Foot drivers in December 2004. However, by April 2005, both the Union and the drivers were out—no contract, no jobs. This development cannot instill in the drivers much faith in a process that seeks to level the playing field between workers and employers. An affirmative order here, in my view, will not only serve to assuage their concerns but will also promote labor peace by instilling confidence in the Act.

An affirmative bargaining order here will also engender meaningful collective bargaining, which in turn promotes labor peace. In this case, a discernible but not proven pattern emerged, that in my mind was troubling. It would appear that at least with respect to DHL's Huntington operation, when the employees of DHL's independent contractor have concerns about the terms and conditions of their employment and take some concerted action to remedy the problems, DHL terminates the contract and secures another contractor. This may seem simplistic, but this happened with Big Foot's predecessor, a company called Prestige Delivery, which operated as a local courier for Airborne Express before DHL bought that company and whose employees went out on strike.

I should be clear that these events were not part of my findings regarding the violation of the Act by the Respondent. However, I cannot turn a blind eye to matters which relate to the policies and purposes of the Act. Here, I am dealing with the perception that employees may have that the Act is being circumvented by one employer working with other employers to deny them the benefits and protections of the Act. Accordingly, under the facts and circumstances of this case, an affirmative bargaining order is recommended to promote industrial peace, employee confidence in the Act, and an efficacious mechanism to resolve labor management issues.

I would also find and conclude that a cease-and-desist order would be inadequate to remedy the Respondent's refusal to bargain with the Union. As I have found, the Respondent did not deal with the Union and the represented employees in a legally sufficient, honest, and forthright way. Without the inducement of an affirmative bargaining order, I believe the Respondent may resort to a decertification petition before the Union and the represented employees have time to regroup and bargain to reach a collective-bargaining agreement.

Accordingly, for these reasons and based on the record as a whole, I find and conclude that an affirmative bargaining order is necessary to remedy fully the Respondent's unlawful refusal to bargain with the Union in this case.

Conclusions of Law

1. The Respondent, Small Stuff, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 505, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent is a successor employer to Big Foot Express, Inc.

4. The following unit constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers and couriers employed by Small Stuff, Inc., performing work at or out of the Paul Coffey Industrial Park facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act, as amended.

5. By failing and refusing to hire applicants because of their union affiliation and/or having chosen the Union to represent them, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By failing to recognize the Union and by failing and refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees, the Respondent violated Section 8(a)(1) and (5)of the Act.

7. By setting initial terms and conditions of employment for employees in the unit without bargaining with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

8. The Respondent's conduct described above constitutes unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has violated the National Labor Relations Act, as amended, I shall recommend that it cease and desist therefrom, and that it shall take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully and discriminatorily refused employment to certain former employees of Big Foot Express, Inc., I shall recommend that the following named employees be offered immediate employment to the positions to which they applied. If such positions no longer exist,

to substantially equivalent positions without prejudice to their seniority or any other rights and privileges and, if necessary, terminating the services of employees hired in their stead, and to make the individuals listed below whole for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, and George Justice.

Having found that the Respondent failed to recognize and bargain with the Union, a bargaining order is necessary prohibiting the Respondent from unilaterally setting the terms and conditions of employment. Finally, it is necessary that the Respondent be ordered, on request of the Union, to rescind any changes in the employees' working conditions and make the employees whole.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[48]

ORDER

The Respondent, Small Stuff, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or consider for hire any employee for being a member of or supporting Teamsters Local Union No. 505, affiliated with the International Brotherhood of Teamsters, or any other labor organization.

(b) Refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time drivers and couriers employed by Small Stuff, Inc., performing work at or out of the Paul Coffey Industrial Park facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act, as amended.

(c) Unilaterally changing unit employees' terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[48] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, and George Justice.

(b) Within 14 days from the date of his Order, offer Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, and George Justice immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, on request of the Union, rescind unilaterally changes in unit employees' terms and conditions of employment.

(d) On request of the Union, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities located in Paul Coffey Industrial Park, Ashland, Kentucky, copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 17, 2005.

[49] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 24, 2006

Earl E. Shamwell Jr.
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire job applicants because they participated in the Union's organizing or because of their union affiliation or otherwise discriminate against employees to avoid having to recognize and bargain with the Union.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time drivers and couriers employed by Small Stuff, Inc., performing work at or out of the Paul Coffey Industrial Park facility, but excluding all salesmen and office clerical employees and all professional employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, and George Justice full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Larry Willis, John Nicholas Perry, Lavonna Jones, Mona Colleen Hall, Jimmy Christopher Bennett, Edward Marshall, Danny Adkins, Mike Stortz, David Oder, Kelly Eplin, Greg Walters, John Brett Campbell, Rick Perkey, Don Perkey, Mark Rose, Mike York, Craig Harbour, Jason Black, Chad Stevens, and George Justice whole for any loss of earnings and other benefits they may have suffered by reasons of our unlawful refusal to employ them, less any net interim earnings, with interest.

WE WILL, recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the unit above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed document.

WE WILL, on request of the Union, rescind any changes from terms and conditions of employment that existed immediately prior to our takeover of the predecessor, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about April 17, 2005.

SMALL STUFF, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.